

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BERNARD ANTONIO IVORY,

Defendant-Appellant.

UNPUBLISHED
December 15, 2011

No. 300861
Wayne Circuit Court
LC No. 10-000515-FC

Before: MURPHY, C.J., and JANSEN and OWENS, JJ.

PER CURIAM.

Defendant appeals by right his bench-trial convictions of two counts of assault with intent to commit murder (AWIM), MCL 750.83, and one count each of possession of a firearm by a felon (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to concurrent prison terms of 225 months to 25¹ years for each of his AWIM convictions and 2 to 5 years for his

¹ At the sentencing hearing, the trial judge initially set defendant's maximum sentence for the AWIM convictions at 20 years, but then observed that he would raise the maximum sentence to 25 years in order to comply with the two-thirds rule of *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972), and MCL 769.34(2)(b). However, the judgment of sentence contained in the lower court file continues to provide for a maximum sentence of only 20 years with regard to the AWIM convictions. Thus, there is a discrepancy between the trial judge's oral ruling and the judgment of sentence. Moreover, even overlooking this discrepancy, defendant's minimum sentence of 225 months is still greater than two-thirds of 25 years. In other words, even a sentence of 225 months to 25 years violates of the two-thirds rule of *Tanner* and MCL 769.34(2)(b). Although it is unclear from the lower court file whether defendant was actually sentenced as an habitual offender, we note that the two-thirds rule "applies to a person sentenced as an habitual offender." *People v Thomas*, 447 Mich 390, 392; 523 NW2d 215 (1994). For these reasons, and despite the fact that this issue has not been raised by defendant on appeal, we must vacate the concurrent sentences of 225 months to 25 years imposed for defendant's AWIM convictions and remand to the trial court for resentencing with regard to these convictions only. After resentencing, the trial court shall prepare a new judgment of sentence that accurately

felon-in-possession conviction. He was also sentenced to a consecutive prison term of two years for his felony-firearm conviction. We affirm defendant's convictions, but vacate his sentence in part and remand for resentencing on his two AWIM convictions.

On October 27, 2009, defendant was involved in a shooting on Detroit's west side that resulted in injuries to two people. Earlier in the day, a landlord had attempted to evict his renter. "Angie," a female friend of the renter, slapped one of the landlord's cousins. The police arrived on the scene and told the renter to vacate the rental unit by 8:00 p.m. that evening. The landlord and several of his relatives later returned to change the locks. A fight then ensued between Angie and the girlfriend of the landlord's cousin. The girlfriend was ultimately stabbed several times. Thereafter, several shots were fired at the landlord's relatives, two of whom were injured. Several of the landlord's relatives and the girlfriend of the landlord's cousin testified that defendant was the shooter. Defendant and Toryanno Griffin, defendant's friend who witnessed the shooting, testified that defendant was unarmed and had been beaten up and shot at by the landlord's relatives. Defendant waived his right to a jury trial and was ultimately convicted.

Defendant argues that his trial attorney rendered ineffective assistance of counsel in several ways. We review unpreserved claims of ineffective assistance of counsel for errors apparent on the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

To establish ineffective assistance of counsel, a defendant must establish that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Defendant first argues that his trial attorney was ineffective for failing to interview eyewitness Griffin before calling him to testify at trial. There is no evidence to suggest that trial counsel did not interview Griffin. Further, there is no prejudice apparent from the record. Although Griffin's testimony was not identical to defendant's testimony, their versions of the events were similar. Specifically, both defendant and Griffin testified that defendant was unarmed and was, in fact, the victim in this matter. Even assuming that defendant is correct in arguing that his attorney failed to interview Griffin, defendant has not demonstrated that he was prejudiced in any way by counsel's conduct in this regard.

Defendant next argues that trial counsel was ineffective for failing to investigate and call other eyewitnesses to the shooting. "[D]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy,' which we will not second guess with the benefit of hindsight." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) (citation omitted). "Furthermore, the failure to call witnesses only constitutes

reflects all of defendant's sentences, including those imposed for the AWIM convictions. The trial court shall also specify on the new judgment of sentence whether defendant has been sentenced under the habitual offender statutes. The new judgment of sentence shall be forwarded to the Department of Corrections.

ineffective assistance of counsel if it deprives the defendant of a substantial defense.” *Id.* Defendant has failed to specifically identify any additional eyewitnesses that his attorney should have called to testify at trial. Furthermore, the record contains no evidence that trial counsel actually failed to interview any witnesses or investigate whether there were additional eyewitnesses to the shooting. Nor has defendant identified the defense of which he was deprived or the manner in which he was prejudiced by counsel’s conduct. A criminal defendant bears “the burden of establishing the factual predicate for his claim of ineffective assistance of counsel[.]” *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Here, defendant has not carried this burden. The existing record reveals no ineffective assistance of counsel with regard to this issue.

Defendant next argues that trial counsel was ineffective for failing to obtain a copy of the police report concerning the incident that occurred earlier in the day. It is not apparent from the record that trial counsel did not have a copy of the police report. It is also not apparent from the record that the police report would have provided any useful information or impeachment evidence. The trial court fully acknowledged that there was a dispute between the landlord’s cousin and Angie earlier in the day; the court further observed that this dispute had led to the subsequent fight between the cousin’s girlfriend and Angie and the ultimate shooting. The court nevertheless found defendant guilty of AWIM on the basis of the testimony presented at trial. In other words, the trial court was already aware of the incident that had occurred earlier on the day of the shooting and fully considered all the circumstances of this case before rendering its verdict. Defendant cannot establish that he was prejudiced by counsel’s alleged failure to obtain a copy of the police report.

Defendant also argues that his counsel was ineffective for failing to allow him to take a polygraph test in exchange for an offer to dismiss certain charges if he passed. There is no record of any such offer from the prosecution or of trial counsel’s advice regarding the polygraph examination. Moreover, any decision by trial counsel in this regard would have amounted to trial strategy, and it is entirely unknown whether defendant would have even passed such a test. Thus, defendant cannot establish prejudice.

Defendant further argues that his trial attorney was ineffective for advising him to waive his right to a jury trial. Defendant knowingly and voluntarily waived his right to a jury trial. Counsel’s decision to recommend that a defendant waive his or her right to a jury trial is generally a matter of trial strategy. See *People v Davenport (After Remand)*, 286 Mich App 191, 197-198; 779 NW2d 257 (2009). Further, we note that both defendant and Griffin had prior criminal convictions that would have been admissible for impeachment purposes. It is entirely possible that counsel strategically recommended a bench trial in order to prevent a jury from hearing about defendant’s prior convictions. Defendant has shown no prejudice resulting from his jury-trial waiver, and we will not second guess counsel’s advice on this matter of trial strategy. *Dixon*, 263 Mich App at 398.

Defendant lastly requests that we remand this case for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973). Defendant has failed to establish why his claims of ineffective assistance of counsel must be initially decided by the trial court and what additional evidence, if any, would be presented on remand. See MCR 7.211(C)(1)(a). We have found no ineffective assistance of counsel on the record before us, and we fail to see how an evidentiary hearing would yield a different result.

We affirm defendant's convictions, but vacate his sentence in part and remand for resentencing on his two AWIM convictions consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Kathleen Jansen

/s/ Donald S. Owens